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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFERY LEWIS FULLER, JR.,

Defendant and Appellant.

F063045

(Super. Ct. No. RF006022A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis and Charles R. Brehmer, Judges.†

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Michael A. Canzoneri, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Cornell, Acting P.J., Gomes, J. and Franson, J.

† Judge Brehmer denied the motion to suppress; Judge Lewis sentenced defendant.

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STATEMENT OF THE CASE

On June 27, 2011, appellant plead no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subdivision (a)) after unsuccessfully moving to suppress evidence discovered during a pat-down search (Pen. Code, § 1538.5)¹. On July 26, 2011, the court suspended imposition of judgment for three years and ordered appellant to serve one year in county jail as a condition of probation. The court ordered appellant to pay a \$200 restitution fine (§ 1202.4, subdivision (b)) and awarded him 188 days of custody credits. Appellant filed a timely notice of appeal. We hold the search was the product of a consensual encounter, not an unlawful detention, and affirm.

STATEMENT OF FACTS

Facts Elicited at the Suppression Hearing

Bakersfield Police Officer Bill Groves testified he was a member of the Ridgecrest Police Department on January 21, 2011. At 12:45 a.m., Officer Groves and a partner, Sergeant Marrone, were patrolling West Reeves Avenue in the City of Ridgecrest. Their patrol car was traveling eastbound on the south side of the roadway. Groves observed a subject walking along sidewalk on the north side of the roadway heading eastbound. The subject was dressed entirely in dark clothing and was about 100 yards away. Sergeant Marrone commented that it seemed suspicious for a pedestrian to be dressed entirely in black in that particular neighborhood because of a recent increase in thefts from vehicles. Grove testified that was why they decided to stop him.

Sergeant Marrone stopped the patrol vehicle; Groves got out, crossed the street and made contact with appellant on the sidewalk. Groves was dressed in his normal police uniform. The headlights on the patrol car remained on, but not directed at appellant. Sergeant Marrone did not shine a white light on appellant, activate a white

¹ All further statutory references are to the Penal Code unless noted otherwise.

spotlight, or turn on the color lights of the patrol vehicle. Groves did not recognize appellant when he got out of the patrol vehicle, but he did recognize him when he saw his face.²

Groves asked appellant where he was walking to. Appellant said he was going to the store to buy some alcohol before the store closed. Groves then asked appellant whether he had any guns, knives, or burglary tools in his possession. Appellant said he did not have anything illegal on his person. Groves next said “do you mind if I search you?” According to Groves, appellant said, “[Y]eah, of course you can search me,” or words to that effect. Groves said he considered appellant free to leave prior to appellant giving consent to search his person. Groves said Sergeant Marrone was present when appellant consented to a search of his person. Groves thought that Sergeant Marrone was carrying an activated flashlight. The officers did not draw any weapons during their contact with appellant and did not place him in handcuffs prior to arrest.

Groves asked appellant to place his hands on his head, with his fingers interlaced for safety. Groves then began a pat-down search of appellant’s person. As Groves conducted the pat-down search, he noticed that appellant “became very fidgety, shifting weight from left to right, and he actually pulled his left hand off his head and started reaching towards his left front jacket pocket.” When appellant started to reach for his pocket, Groves told him to place his hands on his head. Groves checked the left front pocket of appellant’s jacket and found a Ziploc bag containing a white, crystalline substance. Groves removed the bag from the pocket, examined the substance, and suspected that it was methamphetamine. He asked appellant about the contents of the bag and appellant

² On cross-examination, Groves said appellant’s face was not “lit up enough so that [he] could see details” at the time appellant consented to a search.

said, “[I]t looks like crystal.” Based on his training and experience, Groves interpreted appellant’s slang statement to mean the bag contained crystal methamphetamine. Groves seized the bag, placed appellant under arrest, and secured him in the backseat of the patrol car.

On cross-examination, Groves said he and Marrone decided to contact appellant. He explained, “We wanted to contact him. If at some point before I asked if I could search [him,] he said [‘]kick rocks or pound sand,[‘] he could walk away.” In response to further questions, Groves said he did not restrain appellant in any way but did insist that appellant keep his hands on his head. Groves testified that he advised appellant of his *Miranda*³ rights at Kern County Jail in Ridgecrest and asked appellant what he thought the bag contained. At that point, appellant acknowledged the bag contained “crystal meth.” After identifying the contents of the bag, appellant made some comments about how long he had been using methamphetamine.

DISCUSSION

I. DID THE TRIAL COURT ERRONEOUSLY DENY APPELLANT’S MOTION TO SUPPRESS EVIDENCE?

Appellant contends the trial court erroneously denied his motion to suppress evidence (§ 1538.5) because the officers had no legally sufficient grounds for that detention.

A. Ruling of the Trial Court

After receiving supplemental memoranda from the parties, the court ruled by minute order on June 1, 2011:

“Ruling – Defendant’s Motion to Suppress pursuant to PC 1538.5

“DENIED

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

“The initial contact was consensual. There was no command to stop and/or speak with the officer(s). There was no spotlight shown on the defendant. There was no threat of force by the officer(s). The officer(s) did not run toward the defendant.

“The search was done with the permission/consent of the defendant. There was no revocation of that consent either express or implied.”

B. Appellant’s Specific Contention

Appellant contends: “Here, the officers testified to no articulable facts that would support a reasonable suspicion that appellant was involved in criminal activity, and in fact the prosecution did not argue that the detention was based on reasonable suspicion. Grove[s] testified that his partner had noted that appellant was dressed in dark clothing and that there had been recent vehicle thefts and thefts from vehicles in the area ..., but neither officer testified to any suspicious behavior by appellant that would have led them to believe that he was involved in those thefts. The most generous characterization of the officers’ conduct is that they acted upon a hunch. Appellant was unlawfully detained.”

C. Law Governing Review of Suppression Rulings

“The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

“A search without a warrant is presumed to be illegal. [Citation.] Once a defendant shows the search was warrantless, the burden shifts to the People to justify the search by establishing the search fell within an exception to the warrant requirement. [Citation.] One exception to the Fourth Amendment’s warrant requirement is the defendant’s voluntary consent to the search.” (*People v. Bishop* (1996) 44 Cal.App.4th 220, 237.) However, “[a] consensual search may not legally exceed the scope of the

consent supporting. [Citation.]’ [Citation.]” (*People v. Cantor* (2007) 149 Cal.App.4th 961, 965.)

““The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of “objective” reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?’ [Citation.]
“Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of the circumstances. [Citation.]”“ [Citation.]”
(*People v. Valencia* (2011) 201 Cal.App.4th 922, 928.)

D. Analysis

Appellant contends the officers’ conduct constituted a detention within the meaning of the Fourth Amendment and that his consent to search was the product of that unlawful detention.

The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 8-9; *People v. Hernandez* (2008) 45 Cal.4th 295, 299.) “Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual’s liberty. [Citations.]” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*).

“[A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner

restrains the individual's liberty, does a seizure occur. [Citations.]" (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

Although both "detentions" and "arrests" are seizures under the Fourth Amendment, distinctions are drawn between the two concepts since "the constitutional standard for permissible detentions 'is of lesser degree than that applicable to an *arrest*.'" [Citation.]" (*People v. Hester* (2004) 119 Cal.App.4th 376, 385-386, original italics.)

"[A]n officer who lacks probable cause to arrest can conduct a brief investigative detention when there is "some objective manifestation" that criminal activity is afoot and that the person to be stopped is engaged in that activity.' [Citations.] Because an investigative detention allows the police to ascertain whether suspicious conduct is criminal activity, such a detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.' [Citations.]" (*People v. Celis* (2004) 33 Cal.4th 667, 674.)

There is no bright-line rule to determine whether an encounter is consensual or a detention. (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.) "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]" (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

In determining whether there has been a consensual encounter or the suspect has been detained, we must examine both an officer's verbal and non-verbal actions to "assess[] the coercive effect of police conduct as a whole" (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.) An officer's "words and verbal tones are always considered," along with how an officer physically approaches the subject, or if the officer attempts to block the subject's path. (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1110-1112 (*Garry*).)

A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) The appellate court reviews the objective reasonableness of the facts known to the officer, not the officer's legal opinion about those facts. (*People v. Limon* (1993) 17 Cal.App.4th 524, 539 (*Limon*).) The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. The principal function of the officer's investigation is to resolve that very ambiguity and establish whether the activity is legal or illegal. (*In re H.M.* (2008) 167 Cal.App.4th 136, 145 (*H.M.*).)

The Fourth Amendment permits an officer to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot" and that the person detained is engaged in that activity. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123 (*Wardlow*); *Souza*, *supra*, 9 Cal.4th at p. 230.) Courts look to the totality of circumstances of each case in determining whether the "detaining officers [had] a particularized and objective basis for suspecting [the detainee] of criminal activity. [Citations.]" (*Souza*, *supra*, 9 Cal.4th at p. 230; *Brown v. Texas* (1979) 443 U.S. 47, 52; *United States v. Arvizu* (2002) 534 U.S. 266, 273 (*Arvizu*).) This approach allows officers to draw on their own training and experience in deciding whether criminal activity is afoot. (*Arvizu*, *supra*, at p. 273.) We defer to the trial court's factual findings,

express or implied, where supported by substantial evidence. (*Garry, supra*, 156 Cal.App.4th at p. 1106.)

Appellant cites to *Garry* in support of his contention that he was unlawfully detained and searched. In *Garry*, the investigating officer testified at the suppression hearing that he was patrolling an area of Vallejo known as “The Crest” on the late evening of May 3, 2005. (*Garry, supra*, 156 Cal.App.4th at p. 1103.) The officer said “The Crest” was a high-crime, high-drug area where illegal street drugs were sold and where police officers had been assaulted. The officer observed defendant standing next to a parked car on a street corner for five to eight seconds. Before this time, the officer had not made any arrests on this particular corner. However, he testified he had made more than 40 drug-related arrests in the general area. The officer turned on the spotlight of his patrol car to illuminate the defendant, who was about 35 feet away. The officer walked briskly toward the defendant, who appeared nervous, pointed to a house, and said, ““I live right there.”” (*Garry, supra*, at p. 1104.) Defendant took several steps back and the officer asked whether he was on probation or parole. The defendant answered affirmatively and then paused. The officer reached out and grabbed defendant, but the defendant started to pull away. The officer then put defendant in an arm-shoulder lock, placed him on the ground, and handcuffed him. The officer arrested defendant, searched him incident to arrest, and found suspected rock cocaine in his front right jacket pocket. (*Ibid.*)

In *Garry*, the trial court denied defendant’s suppression motion and a jury convicted him of possessing cocaine base for sale. He appealed and the First District Court of Appeal reversed, finding an erroneous denial of the suppression motion. The officer’s testimony made clear that his actions, taken as a whole, would be very intimidating to any reasonable person. After only a few seconds of observing defendant from his marked police vehicle, the officer “bathed defendant in light,” exited his vehicle, briskly walked 35 feet in two or three seconds, proceeded directly to defendant and

questioned him about his probation and parole status. (*Garry, supra*, 156 Cal.App.4th at p. 1111.) The officer, armed and dressed in a uniform, disregarded defendant's claim that he was merely standing outside his home. Rather than engage in a conversation, the officer immediately and pointedly inquired about defendant's legal status. The First District held that only one conclusion was possible from this undisputed evidence – that the officer's actions constituted a show of authority so intimidating as to communicate to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter. The appellate court acknowledged that the officer did not make any verbal commands. Nevertheless, the court held the officer's actions set an unmistakable tone, largely through nonverbal means, that compliance with the officer's request might be compelled. (*Id.* at pp. 1111-1112.)

Citing to *Garry*, appellant notes that Officer Groves approached him on a dark street and “demanded” to know where he was going. Appellant asserts that Groves approached him “quickly,” crossing a 26-foot wide street in about two seconds. According to appellant, Groves immediately contacted him, asked if he possessed anything illegal, and asked whether he would allow himself to be searched. Groves testified that the search took place less than one minute after the initial contact. In appellant's view, “a reasonable person would not have felt free to terminate the encounter and walk away.”

Respondent concedes that “if this Court determines the contact between the officers and appellant was a detention rather than a consensual encounter, prior to obtaining consent to search, then that detention would be unsupported by any reasonable suspicion, and appellant's prayer for relief should be granted. Also, respondent is mindful that case law holds if consent to search is the product of an unlawful detention, then that consent is inoperative absent some attenuating circumstances, not present in the instant case. (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.)”

Having made these acknowledgments, respondent maintains that Groves's initial contact with appellant came within the scope of a consensual encounter. This court has observed: "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt is made to block the way." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 940.) Respondent correctly points out that if parking behind a pedestrian does not constitute a detention, then the parking of a police vehicle across the street from a pedestrian should also not be deemed a detention. Moreover, respondent points out that Officer Groves walked across the street, asked appellant a non-threatening question about his destination, and did not prevent him from attempting to walk away. Groves did not draw a weapon, use a spotlight on the patrol car to illuminate appellant, or employ physical force. Officer Groves obtained permission from appellant to conduct a pat-down search. When appellant slowly moved his left hand from the top of his head toward the left pocket of his jacket, Groves instructed appellant to place the hand back on his head. Appellant obeyed the officer's instruction.

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. [Citations.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citation.] He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. [Citation.]" (*Florida v. Royer* (1983) 460 U.S. 491, 497-498.)

More recently, the U.S. Supreme Court has stated: "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask

for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means.” (*United States v. Drayton* (2002) 536 U.S. 194, 201.) “[I]t is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter. [Citations.]” (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen, may we conclude that a seizure has occurred. (*Terry v. Ohio, supra*, 392 U.S. at p. 19, fn. 16.)

Appellant contends his contact with the officers was a detention rather than a consensual encounter. In addition to *Garry*, he cites several suppression cases to support his position; however, these cases are factually distinguishable.⁴ He also acknowledges

⁴ *People v. Jones* (1991) 228 Cal.App.3d 519 [A police officer was on patrol in an area of Oakland known for high narcotics activity, sales, and use. The officer saw a group of men on a street corner and watched one man hand money to the defendant. The officer pulled his patrol car to the wrong side of the road and parked diagonally against the traffic about 10 feet behind defendant and the other men in the group. As the officer stepped out of his car, defendant began to walk away. The officer asked defendant to stop and defendant complied and immediately reached toward his left-rear pocket with his left hand. The officer reached out, grabbed defendant’s forearm, and pulled defendant’s fingers from the pocket. As the officer did so, he saw a bag of narcotics in the pocket. The appellate court affirmed, holding defendant was detained because a reasonable man would not believe he was free to leave when directed to stop by a police officer who arrived suddenly and parked his car to obstruct traffic.]

People v. Roth (1990) 219 Cal.App.3d 211 [During the early morning hours of February 7, 1988, two San Diego County sheriff’s deputies conducted a security check of closed businesses in an Alpha Beta shopping center. They saw defendant, dressed in bulky clothing, walking in the parking lot about 30 yards from the Alpha Beta store. One deputy shined a spotlight on defendant and stopped the patrol car. Both deputies got out of the car and one approached defendant saying he wanted to speak with defendant. Defendant came to the patrol car and one deputy asked what he was doing in the area. Defendant claimed he was going to the store but the deputy said it was closed. Defendant next claimed that he was going to look for junk in the store dumpsters. In response to a

that the U.S. Supreme Court has held that simple questioning will not transform a police encounter into a seizure “unless the circumstances are such that a reasonable person would not feel free to walk away, when police action actively impedes the person’s ability to terminate the encounter and go about his business” He nevertheless contends he submitted to the officers’ show of authority by remaining in place to answer the officers’ questions.

When a felony defendant brings a suppression motion for the first time upon the filing of an information, the trial court sits as a finder of fact with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences. On appeal, we review the trial court’s factual findings for substantial evidence and presume their correctness. (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1359-1360.) Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) In this case, the testimony of Officer Groves supported the factual findings of the trial court and reversal of the order denying suppression is not required.

deputy’s question, defendant acknowledged that he was carrying weapons. The deputy had defendant spread-eagle on the patrol car and removed a hammer, unloaded .22 automatic pistol, and three knives from his person. The appellate court held that the officers acted illegally in detaining defendant and patting him down.]

People v. McKelvy (1972) 23 Cal.App.3d 1027 [During the 3:00 a.m. hour of April 11, 1970, San Bernardino police saw defendant walking across the front lawns of residences. The officers considered the behavior peculiar because there were sidewalks in the area. In addition, a curfew forbade loitering between 11:45 p.m. and 6:00 a.m. The officers put a spotlight on the defendant and, as they did so, defendant placed a small, dark-colored object in his front pocket. The officers stopped their patrol vehicle, got out, and carried firearms. One officer approached defendant with a shotgun. The appellate court held that denial of suppression could not be upheld on the basis of voluntary consent to seizure, search incident to arrest for curfew violation, or search incident to a detention for investigation.]

DISPOSITION

The judgment is affirmed.